Supreme Court, U.S.
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No. 95-1464

In The

Supreme Court of the United States

October Term, 1995

SARA B. HAZEN,

Petitioner,

v.

EVELYN B. COOPER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth District

BRIEF IN OPPOSITION

SCOTT ROTHENBERG
DAVID M. GUNN
Counsel of Record
ROTHENBERG & GUNN
4710 Bellaire Blvd., Suite 160
Bellaire, TX 77401
(713) 667-5300

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

In States where judges run for office, is it a *per se* violation of the Due Process Clause for a judge to sit in a case involving any party or attorney who has made a campaign contribution?

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OPINIONS BELOW

The opinion of the state court of appeals (Pet. App. 1a-13a) is unreported. All other orders below (Pet. App. 14a-15a, 29a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a-15a) was entered on Dec. 15, 1994. A motion for rehearing was denied on Jan. 19, 1995. Pet. App. 31a-32a. An application for writ of error was denied by the Texas supreme court on Nov. 16, 1995. Pet. App. 33a-34a. A motion for rehearing was denied on Dec. 14, 1995. Pet. App. 35a-36a. The petition for writ of certiorari was filed on March 12, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

STATEMENT

This is a will contest case which Petitioner brought against her sisters. The suit started nearly ten years ago, and a state court finally dismissed it for want of prosecution. A state court of appeals upheld the dismissal, and the state supreme court denied review.

The Texas judiciary is popularly elected, as it has been since 1876. Tex. Const. art. V, §§ 2, 4, 6, 7, 15. Judges and judicial candidates must report campaign contributions over $50 with state authorities. *See generally* Tex. Elec. Code Ann. §§ 254.001, 254.031 et seq. (Vernon Supp. 1996). Those reports are open to public inspection, as

Petitioner recognizes. *See* Pet. App. 19a (describing Petitioner's "examination of sworn statements of contributions and expenditures filed . . . with the County Clerk of Harris County, Texas"). Violations carry criminal and civil penalties. *See, e.g.*, Tex. Elec. Code Ann. § 254.041 (Vernon Supp. 1996).

State law compels judicial disqualification where the judge either (1) has an interest in the case, (2) is related to any of the parties, or (3) has served as counsel in the case. Tex. Const. art. V, § 11. State law also mandates recusal in other instances, such as where the judge's "impartiality might reasonably be questioned." Tex. R. Civ. P. 18b(2)(a); *see also* Tex. R. App. P. 15a (applying the rule to appellate judges). The recusal rule is roughly similar to 28 U.S.C. § 455, the federal recusal statute. Nothing in State law, however, compels disqualification of judges on the naked basis of campaign contributions. Decisions construing the State recusal rule uniformly hold that campaign contributions furnish no ground for recusal. *E.g., Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App. – San Antonio 1982, no writ).

Sup. Ct. R. 10 cautions attorneys that "a petition for writ of certiorari will be granted only for compelling reasons." Perhaps it is for this reason that Petitioner represented the facts controlling disposition of her petition as somewhat more "compelling" than is actually the case. In compliance with Rule 15.2, Respondents take this opportunity to clarify certain of the misstatements of fact contained in Petitioner's petition for writ of certiorari so that this Court may make a fully informed decision as to whether this is a compelling case meriting this Court's review.

First, Petitioner takes great pains to carefully list each of the several campaign contributions at issue in this case. Pet. 8-9. What Petitioner fails to tell this Court is that almost all of the contributions at issue were given in 1986 – approximately six years before the trial court judge signed the order dismissing the lawsuit for want of prosecution. What is the likelihood that a busy trial judge would even remember modest campaign contributions from well over a half-decade prior to his ruling in this case?

Second, Petitioner informs this Court that certain of the Respondents gave a total of approximately $4,700 in cash contributions. Pet. 9. Petitioner makes no attempt whatsoever to show this Court what percentage of all contributions received by this particular trial court judge is represented by the $4,700 in question. Surely, contributions which total 0.00001% of total campaign contributions for a given period are different for due process purposes than contributions which total 75% of total contributions during that same period.

Third, Petitioner places great emphasis upon the fact that certain of the Respondents guaranteed a $30,000.00 political campaign bank loan received by the trial judge. Pet. 9. Once again, Petitioner fails to tell this Court that the guarantee was given several years prior to the ruling that ended this lawsuit. Furthermore, there is not even a scintilla of evidence to be found that any of the Respondents were required to pay even a penny as a result of the guarantee in question.

Fourth, Petitioner points out that several of the contributions in question were made by parties to the lawsuit

and not merely attorneys for the parties. Pet. 9. What Petitioner failed to tell this Court is that the lawsuit in question began as a simple will contest between Petitioner on one side, and her sisters, Evelyn B. Cooper and Isabell Tradd, on the other. It was Petitioner who made the decision to bring various probate attorneys, law firms and banks into what was otherwise a family dispute. If a person files suit against enough law firms and attorneys, it is inevitable that eventually, she will find one or more who have contributed to judicial campaigns at some time in the past. That is precisely what happened in this lawsuit. The Court will note that Ms. Cooper and Ms. Tradd – the real defendants in this litigation – did not contribute a penny to the trial judge's campaign, either immediately before the lawsuit was dismissed or at any time in the past.

Fifth, Petitioner states that the federal issue raised in her petition for certiorari was first raised in the trial court in her motion for recusal. Pet. 9. What Petitioner failed to tell this Court is that – to the extent that she even raised a federal question at all – she did so more than half a decade after she filed her lawsuit in April of 1987, more than six years after the most recent of the campaign contributions at issue was given, and just weeks after the trial court had previously dismissed her lawsuit for want of prosecution.

Sixth, Petitioner complains that the campaign contributions in question influenced the trial court to wrongly dismiss her lawsuit for want of prosecution. Pet. 11-12. What Petitioner failed to tell this Court is that a three judge panel of the Court of Appeals for the Fourteenth Judicial District of Texas held as a matter of law that the

trial judge did not abuse his discretion when he dismissed the lawsuit – which had been languishing on the trial court docket for many years. Thus, even assuming for the sake of argument that every judge who accepts any campaign contribution in any amount from any attorney or party at any time in his or her life is disqualified from hearing a case involving that party or attorney, it would have made no difference with regard to the ultimate disposition of this lawsuit.

Seventh, Petitioner tells this Court that "the trial court ordered that she have no discovery powers," and that this order was repeated in a subsequent order by the trial court. Pet. 11, 14. What Petitioner failed to tell this Court is that the trial court expressly told Petitioner's attorney that if he wished to perform discovery in the lawsuit, he should request such permission from the trial court. In the six-plus years between the date the lawsuit was filed and the date the lawsuit was dismissed for want of prosecution, Petitioner's attorney never once requested permission to perform discovery in the lawsuit.

Eighth, as evidence of the trial court's supposed bias and prejudice in favor of Respondents, Petitioner tells this Court that the trial court "never proceeded to set the case for trial." Pet. 12. What Petitioner fails to tell this Court is that from the time the lawsuit was filed in April of 1987, until several years later when Respondents filed a motion to dismiss for want of prosecution, Petitioner never requested that the case be set for trial.

Ninth, Petitioner tells this Court that the trial court's "failure to recuse himself in response to Petitioner's motion for recusal shows bias and prejudice." Pet. 13.

What Petitioner fails to tell this Court is that the trial court judge was in no way involved in the decision as to whether he should be recused because of campaign contributions. In accordance with the procedure set forth in Texas Rule of Civil Procedure 18a, the trial court judge referred Petitioner's motion to recuse to Visiting Judge Blackstock. It was Judge Blackstock who determined that Petitioner's motion to recuse should be denied. Judge Blackstock's order overruling Petitioner's motion to recuse cannot be construed to create bias or prejudice on the part of the trial court judge who was not involved in that ruling in any manner whatsoever.

Tenth, Petitioner tells this Court that Respondents are "the same people [the trial court judge] would look to at the time for re-election." Pet. 25. Presumably, she does so to create the impression that the trial court judge had a "direct, personal, substantial, pecuniary interest" in reaching a conclusion against Petitioner and in favor of Respondents. What Petitioner failed to tell this Court is that there is absolutely no evidence whatsoever in the record that the trial court judge would receive any future campaign contributions as a direct result of his ruling on the motion to dismiss for want of prosecution.

Eleventh, Petitioner states, without citing any authority for the proposition, that she was "assured by the trial court that her claim would be tried." Pet. 16. That statement of fact is, simply put, a misrepresentation.

Finally, Petitioner states that after "obtaining political contribution information from the records of the county clerk, petitioner filed a motion for recusal." Pet. 16. What Petitioner failed to inform this Court is that although the

"political contribution information" in question had been on file in the public records of the Harris County Clerk's office for over six years, Petitioner's attorney waited until the trial court dismissed the lawsuit for want of prosecution before even looking to the records in question.

Taken separately, the distinction between the manner in which Petitioner presents the dozen facts in question and the true facts of this matter is not significant. Considered as a whole, however, the discrepancies between the facts are represented by Petitioner and the true facts of this case help to establish that there does not exist – in the words of Rule 10 – a compelling reason for this Court to review this matter.

ARGUMENT

If the state court of appeals even decided a federal question, it did so correctly. Its decision does not conflict with any decision of this Court or of any other court. Moreover, the factual record is poorly developed. Further review is unwarranted.

1. There is no clear decision on any federal question.

The meaning of the decision below is unclear. The decision only devotes two sentences to the constitutional issue: "We have held that the receipt of campaign contributions in this case does not establish bias or prejudice. Thus, Hazen's constitutional right to a fair trial has not been violated." Pet. App. 11a. Unlike cases such as *Michigan v. Long*, 463 U.S. 1032 (1983), where a state court

expressly invokes analogous provisions from the federal Constitution and a state constitution, the legal basis of the decision here is vague. The court below might not have passed on a federal question.

Indeed, Petitioner may not have been relying on the Due Process Clause at all. And if she was, the court below may not have known it. Her briefing in the state court of appeals never mentions the Due Process Clause. *See* Brief of Appellant at 39 (citing only the state due process clause, Tex. Const. art. I, § 19). Perhaps the court felt that no federal question was presented and chose to speak only of the state constitution. Perhaps this is why Petitioner fails to provide a statement of preservation under Sup. Ct. R. 14.1(g)(i).

If Petitioner means her federal question to cover judges who take contributions from litigants (rather than from lawyers), then that question was not decided below. As Petitioner admits, "The court of appeals *failed to rule on the question* of whether the receipt of political campaign contributions from litigants by a judge should require his recusal." Pet. 6 (emphasis added). On that question, then, there is no underlying decision to review.

2. There is no conflict on any federal question.

This Court normally exercises its certiorari jurisdiction in keeping with familiar criteria. Sup. Ct. R. 10. Those criteria have been ignored because they cannot be met. There is no conflict.

If the court below actually passed on any federal question, it did so in keeping with American tradition

and in harmony with other courts. Under the Due Process Clause, the test for disqualification is whether the judge has a "direct, personal, substantial, pecuniary interest." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). That test has caused disqualification of one state appellate court judge – "We also hold that his interest was who had a 'direct, personal, substantial, [and] pecuniary interest' " – but not his colleagues. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986); *see id.* at 825-26 ("we find it impossible to characterize [their] interest as ' " 'direct, personal, substantial, [and] pecuniary' " ' "). The test is regularly applied by lower courts:

> The Supreme Court's disqualification cases illustrate this point. The cases requiring disqualification all involved "direct, personal [and] substantial" influences on the judges involved. *Aetna*, 475 U.S. at 822, 106 S. Ct. at 1585. In each of these cases, it is fair to say that the influences involved struck at the heart of human motivation, that an average man would find difficult, if not impossible to set the influence aside.

Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1373 (7th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1404 (1995). Routine campaign contributions do not create such a "direct" and "pecuniary" interest as to compel disqualification.

Contrary to Petitioner's suggestion, "appearances" are not the constitutional test. To quote Judge Easterbrook, "The Constitution does not contain a ratchet, ensuring that every new rule protecting the appearance of propriety becomes insulated from change by political actors and that every improvement in federal statutory

law applies to state judiciaries." *Del Vecchio*, 31 F.3d at 1389-90 (Easterbrook, J., concurring). Judge Easterbrook has explained:

> Our notions of proper judicial conduct are just that – ideas about *propriety* rather than about constitutional minima that everyone must accept. That is why the Court distinguished in *Aetna* between a financial stake in the outcome of the case and a dislike of insurance companies . . . . Federal judges are free to, and should, expect more than the constitutional minimum from themselves, but we cannot insist that the states do likewise.

Id. at 1392 (emphasis by Judge Easterbrook). The larger point is not merely that the decision below is correct, although that happens to be true. The larger point is that the decision accords with decisions of this Court and of other lower courts. Petitioner alleges no conflict of decisions, because none exists.

3. The federal question (if one exists) is poorly presented.

To the extent that the federal question is significant in some abstract sense, this case is a poor vehicle for reaching it. The facts are unclear. We do not accept Petitioner's unsupported allegations regarding who gave how much to whom. Those allegations have never been proven. For one thing, the recusal motion was denied without explanation. The judge who denied it may have disbelieved Petitioner's allegations. The judge may have believed some (unknown parts) of those allegations. The judge may have believed the allegations but decided that

they did not require recusal. Or, the judge may have declined to do any fact-finding, on the ground that the recusal motion was untimely. Texas law is in disarray over the deadline for a recusal motion. Some cases say a post-trial motion is timely. *E.g., CNA Ins. Co. v. Scheffey*, 828 S.W.2d 785, 793 (Tex. App. – Texarkana 1992, writ denied). Some say the opposite. *E.g., Waste Water Inc. v. Alpha Finishing & Dev. Corp.*, 874 S.W.2d 940, 944 (Tex. App. – Houston [14th Dist.] 1994, no writ); *Vickery v. Texas Carpet Co.*, 792 S.W.2d 759, 763 (Tex. App. – Houston [14th Dist.] 1990, writ denied). The trial judge may have thought the recusal motion was late, but this record simply does not say.

To accept Petitioner's constitutional argument – that the Due Process Clause compels all state judges to step aside when a lawyer or litigant has made a campaign contribution, no matter what size and no matter how long ago – would work a great change in the law. Doing so would upset countless final judgments and impact the judiciaries of many States. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (the authority of a State's citizens to determine the qualifications of their elected judges lies at the heart of representative government). Before considering such a step, this Court should at least have the benefits of further percolation in the lower courts and a clearer factual record.

4. Petitioner's analysis of the federal question (if one exists) is incorrect.

Assuming for the sake of argument that the facts stated in the petition are correct, and assuming for the

sake of argument that Petitioner raised a federal issue in the trial court and appellate courts below, and assuming that Petitioner did not waive the right to attempt recusal or disqualification because she waited until after dismissal of her lawsuit to do so, Petitioner's legal analysis is incorrect and does not support the relief she seeks from this Court. Essentially, Petitioner cites the federal statute pertaining to recusal of judges, 28 U.S.C. § 455, notes that it is similar to the Texas statute regarding recusal of judges, Texas Rule of Civil Procedure 18b, and somehow concludes that because the Texas courts do not construe Rule 18b in the same manner as the federal courts construe 28 U.S.C. § 455, that Petitioner has been denied due process of law.

In support of this mode of analysis, Petitioner relies heavily upon this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The problem with Petitioner's reliance is that in *Liljeberg*, this Court was reviewing the propriety of a federal judge's decision not to recuse himself based upon the federal recusal statute. In no way, shape or form did this Court even address the Due Process limits on a state trial court judge's qualification to hear a case involving a party or attorney from whom, many years past, the judge had accepted a campaign contribution. Nevertheless, Petitioner attempts to elevate *Liljeberg*'s discussion of statutory recusal to federal constitutional dimensions, when no court – including this Court – has ever condoned such an application. *See* Pet. 20 ("It has been the petitioner's position in this case that the Texas rule should be applied with the same standard as adopted by this Honorable Court in *Liljeberg, supra*. . . . ").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SCOTT ROTHENBERG
DAVID M. GUNN
Counsel of Record
ROTHENBERG & GUNN
4710 Bellaire Blvd., Suite 160
Bellaire, TX 77401
(713) 667-5300